80276-9

NO. 56736-5-I

COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

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MICHAEL JAMES MILLER,

Appellant,

v.

ESTATE OF PATRICK W. CAMPBELL, by and through its Personal Representative CHARLES W. CAMPBELL,

Respondent.

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# BRIEF OF RESPONDENT TO AMICUS

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## I. IDENTITY OF RESPONDING PARTY

The Estate of Patrick W. Campbell, by and through its Personal Representative Charles W. Campbell, (hereafter, Campbell) submits the following in response to the Brief of Amicus WSTLA.

## II. COUNTER STATEMENT OF THE CASE

Appellant Michael James Miller asks this Court to reverse the lower court's application of judicial estoppel to his lawsuit for alleged childhood sexual abuse. As WSTLA notes, there is "undisputed evidence that Miller knew of some abuse and had some awareness that it was hurtful at the time of his bankruptcy." Amicus Brief at 13. Indeed, this is apparent upon any review of the facts.

| | |
|---|---|
| 1975-1984 | Miller alleges he was abused by Campbell. |
| 1975-present | Miller experiences nightmares (CP 414), upsetting intrusive thoughts (CP 416), slept with a baseball bat, slept with the lights on (CP 414), experienced sexual dysfunction as part of the intrusive thoughts (CP 416-17). |
| 7/29/98 | Miller files "no asset" bankruptcy (CP 285; 291-93). |
| 11/17/02 | Patrick Campbell dies (CP 334). |
| 3/27/03 | Miller signs a Creditor's Claim for half a million dollars based on sexual abuse occurring 1975-84 (CP 617-18). |
| 3/28/03 | Miller sees Dr. Lisa Adriance for the first time and reports the above history (CP 338-39; CP 331). |

After March 28, 2003, Miller alleges having recovered additional memories of abuse and making additional causal connections to alleged injuries. Miller concedes that his current lawsuit is based only on "his most serious injuries" not on any injuries for which he made a causal connection before March 8, 2003. CP 272.

The above timeline does not include a date upon which Miller informed the bankruptcy trustee of his current lawsuit based on alleged pre-petition conduct. This is because, there is no evidence that Miller has ever placed his bankruptcy trustee on notice of these supposed pre-March 8, 2003 claims, reopened his bankruptcy to administer these claims, that the bankruptcy trustee has been substituted as the real party in interest to those claims, or given the opportunity to participate in these proceedings in any way.

## III. SUMMARY OF ARGUMENT

WSTLA asserts that the trial court abused its discretion by applying judicial estoppel. WSTLA agues that under Washington law, Miller was unable to recognize that he had a claim and therefore had no duty to disclose it. Alternatively, WSTLA argues Miller could not hold inconsistent positions in failing to disclose a claim and later pursuing a lawsuit because he could not consciously understand he had a claim to disclose.

WSTLA's position is wrong in fact and in premise. Miller did have knowledge of a claim and did have the ability to disclose same before the receiving the psychological treatment he maintains extended the statute of limitations. Nor is there any inequity in requiring disclosure of an immature "claim" when a plaintiff freely chooses to enter a forum where such disclosure is required.

Neither equity, public policy, nor the undeniable facts demonstrate an abuse of discretion. The trial court's decision should stand.

## IV. ARGUMENT

WSTLA and Miller assert a number of variations of the same argument. Essentially, that argument is that judicial estoppel should not be imposed on an alleged victim of childhood sexual abuse because doing so conflicts with the policy of the State of Washington Statute of Limitations, RCW 4.16.340.

There is no such conflict. RCW 4.16.340 contemplates the existence of earlier, immature claims but extends the outer point of a lawsuit with discovery of additional injuries. Nowhere in any statute, policy, decisional law or even dicta does it state that this applies to anything but the statute of limitations.

But more directly, the generalizations that a plaintiff may have a disability, or may not recognize he has been injured, are simply not

applicable to this action, where the debtor/plaintiff can and did make a claim based on his "immature" claim.

**A. WSTLA's position is based on a false factual premise.**

WSTLA's (and Miller's) basic premise is that under Washington policy, Miller could not have known and thus disclosed an immature "claim" until he knew the full extent of his claimed injuries and triggered the statute of limitations.

This premise is factually false. Miller could and did file a creditors claim before those events he claims provided him the additional knowledge to extend the statute of limitations.

Miller claims that he became aware of the additional acts and injuries comprising his lawsuit after seeing Dr. Adriance beginning on March 28, 2003. But he was able to sign a creditors claim on March 27, 2003, **before** he knew all the alleged acts and injuries. Thus, the entire basis for WSTLA's (and Miller's) position is factually incorrect.

The court need go no further in affirming the trial court.

**B. Miller had an immature, contingent claim on July 29, 1998.**

Under RCW 4.16.340, the statute of limitations (triggering the end point of a lawsuit) does not run until a plaintiff knows the full extent of his claimed injuries. However, the statue recognizes that a plaintiff may have knowledge of the abuse and knowledge of some injuries. That is the type

of knowledge at issue here: no one disputes that "Miller knew of some abuse and had some awareness that it was hurtful at the time of his bankruptcy." *See* Amicus Br. At 13. Moreover, no one disputes that based on that knowledge alone, Miller was able to sign a creditors claim on March 27, 2003 for $500,000.

WSTLA asserts that because Miller claims to have learned more about additional abusive acts and injuries **after** he filed his $500,000 claim, he was not required to disclose what he did know in bankruptcy. That is, that no disclosure was required until Miller knew the full extent of the alleged harm, in other words, a mature claim.

But Miller was required to disclose an immature claim no matter how contingent. Miller was required to disclose the type of information that comprised his $500,000 claim. He had the same knowledge on July 29, 1998 as he had on March 27, 2003. The assertion that Miller learned of additional acts and claims later does not eliminate the duty to disclose what he did in fact already know.

### C. The failure to disclose the immature claim is inconsistent with the filing the "mature" Complaint.

WSTLA argues that a debtor/plaintiff cannot make clearly inconsistent representations until he knows the full extent of his alleged injuries. This is simply an attempt to restrike the rejected "intent" element as "conscious choice." However the logic is backwards. Simply put, a

lawsuit necessarily encompasses an immature "claim", not the other way around.

WSTLA's position might be persuasive if the disclosure requirement in 1998 was restricted to "fully accrued lawsuits where the debtor/plaintiff is fully aware of the full extent of all alleged acts and injuries." However, the disclosure requirement is much broader than that. If Miller had "some" knowledge in 1998, the representation that he had "none" is clearly inconsistent with "even more" in 2003.

Moreover, WSTLA's position ignores the fact that Miller **was** able to make a claim for $500,000 **before** discovery of any of the additional acts and injuries he maintains comprise the full extent of his knowledge and extend the statute of limitations. The only conclusion to be drawn is that while the alleged additional knowledge may create an issue of fact extending the statute of limitations, the lack of that knowledge did not preclude him from making a claim.

To escape this damming conclusion, Miller repeatedly argues that he is only seeking recovery for those acts and injuries discovered **after** March 28, 2003. But even assuming the court would permit claim splitting in this manner, Miller never filed a second creditors claim for these separate acts of abuse and separate injuries. Therefore, Miller did

not see these as separate claims at all, and this argument simply holds no weight and does not eliminate prior knowledge.

### D. The statute of limitations is not relevant to the determination of whether a "claim" existed or whether Miller was required to disclose it in 1998.

The statute of limitations is not even relevant to the determination of the federal duties and definitions at issue here because they determine different points in the evolution of the claim and serve different purposes.

The purpose of the statute of limitations is to determine the latest point at which a victim may obtain a remedy from a wrongdoer. The purpose of federal bankruptcy statutes and the definition of a claim is to determine what potential assets may exist to satisfy innocent creditors who are being denied rightful recovery of funds. The statue of limitations determines the **endpoint** of a lawsuit, after which it is barred. The bankruptcy code concerns the potential of even future claims.

Before filing his lawsuit, Miller voluntarily submitted himself to the bankruptcy court, its requirements and statutes, to obtain the benefit of a fresh start. His creditors lose the right to recovery in order for him to obtain this fresh start. It is his own "conscious choice" to involve third parties and their interests in his own, that is why his assets and "claims" are no longer his own and why his interests are no longer the sole consideration. The policy of providing the plaintiff a remedy must give

way to his earlier obligation to disclose, an obligation he freely accepted and benefited from.

### E. Equity supports application of judicial estoppel in this matter.

WSTLA essentially argues that it is inequitable to apply judicial estoppel to Miller or **any** alleged victim of childhood sexual abuse. Of course, imposing such a general rule precludes any discretion of the trial court in defiance of the very doctrine itself. More importantly, such a rule is not necessary or appropriate. The doctrine of judicial estoppel carries with it sufficient equitable considerations to preclude application where it is not warranted. The trial court applied those equitable considerations in this matter and acted well within its discretion. Moreover, Miller himself has not done equity and has not earned the equitable consideration he requests.

#### 1. It is not inequitable to hold Miller to his word.

Assuming *arguendo* that the bankruptcy code places Miller on inquiry notice to discover latent injuries, why is it inequitable to hold Miller to that requirement which he freely assumed as part of his bankruptcy? He voluntarily entered into bankruptcy court to obtain the benefits of a discharge and thus voluntarily agreed to accept its restrictions. It is not inequitable to ask this Court to respect the requirements of another court, particularly when Miller chose to be there.

Childhood sexual abuse victims frequently sign releases of liability before ever filing a lawsuit. Such claimants may go on to discover additional acts or injuries that would extend the statute of limitations, but that does not render the release inequitable because it places the claimant on "inquiry notice." Miller is in no different position, indeed, his position is worse because he made representations to the court upon which the court relied in granting him his discharge.

**2. The doctrine of judicial estoppel provides for the equitable considerations urged by WSTLA.**

In essence, WSTLA argues for a general rule that it is inequitable to apply judicial estoppel to alleged victims of childhood sexual abuse because of Washington policy that such victims may not know the full extent of their injuries or may not remember that the alleged abuse occurred. There is no need to impose such a general rule, because such considerations are already part of the doctrine.

Indeed, Washington law already recognizes that judicial estoppel might not apply in cases of simple error or inadvertence, that is, when the debtor lacks knowledge of the undisclosed claim or has no motive for concealment. *Cunningham v. Reliable Concrete Pumping, Inc*, 126 Wn. App. 222, 108 P.3d 147 (2005). Thus, in such instances where the debtor/plaintiff actually presents evidence of an absence of knowledge or of no memory, the trial court already has the ability and the discretion to

deny application of judicial estoppel. That is just not the factual pattern presented herein.

However, the general rule urged by WSTLA would deny trial courts the discretion to apply judicial estoppel even in cases where the debtor/plaintiff is consulting with counsel during the pendency of a bankruptcy petition[1], or in cases wherein the debtor/plaintiff admits having discussed a lawsuit with other persons before filing a bankruptcy petition, but no claim is disclosed.

Therefore, adoption of the rule proposed by WSTLA would unnecessarily restrict the discretion already granted to trial courts, produce injustice to creditors, and promote nondisclosure under federal statutes.

### 3. The trial court appropriately applied those equitable considerations in this matter.

Judge Knight considered the undisputed facts of this matter in detail and on the record under the appropriate equitable considerations. VRP 23-48; *see also*, VRP 47-48. He determined, as did WSTLA, as did Miller himself, that Miller did indeed have knowledge of the alleged acts and some alleged injuries, and that alleged later gained knowledge went to the statute of limitations, not knowledge of a potential claim. He gave the specific facts of this matter the equitable considerations required. He did

[1] This case is currently being briefed for consideration by this Court under No. 57605-4.

not abuse his discretion by finding what all parties have admitted to: Miller had knowledge of a claim.

**4. Miller still has not complied with the bankruptcy code.**

WSTLA argues that in equity, judicial estoppel should not be applied to Miller. But Miller has not himself acted equitably.

Miller presents no evidence that he has ever informed the bankruptcy estate of a potential asset, not at the time of bankruptcy, not upon filing his creditors claim, not upon filing his Complaint, not when Campbell filed summary judgment on this basis, not now. There has been no substitution of the real party in interest. The estate has not appeared as an amicus or other interested party, though it clearly has a very real (if opposing) interest in this matter.

Miller has repeatedly sought to escape the consequences of his actions by asserting that he is not seeking recovery for those acts he remembered or injuries of which he had knowledge before seeing Dr. Adriance on March 28, 2003. Yet if he has, as he proposes, two separate claims based on separate incidents (and assuming the court were willing to recognize splitting claims in this manner) why did he only file a single creditors claim on March 28, 2003, before the new memories and injuries? Moreover, this is not his claim to forgo; it belongs to the bankruptcy trustee.

Miller is simply not entitled to the equity WSTLA urges the court to find.

## V. CONCLUSION

WSTLA's position is basically that the debtor/plaintiff must know the full extent of his alleged injuries before the federal duty to disclose is imposed, or before his lawsuit can be considered to be "clearly inconsistent" with prior non-disclosure of a claim. This ignores the entire law of bankruptcy, a statutory system to which Miller voluntarily agreed in order to obtain its benefits, and rewrites the doctrine of judicial estoppel. The trial court's carefully reasoned decision should be upheld,

RESPECTFULLY SUBMITTED this 13th day of September, 2006.

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## CERTIFICATE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that I caused service of the foregoing pleading on each and every attorney of record herein:

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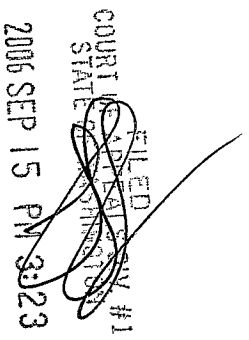


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